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PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 187

ELIZABETH ANN DUNCAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

The Opinion Below

The Opinion of the California Supreme Court is reported at 53 Cal. 2d 803, 350 P. 2d 103 (R. 137).

Jurisdiction

The Opinion of the California Supreme Court was entered on March 11, 1960 (R. 137). The petition for writ of certiorari was filed on June 7, 1960, and was granted on June 27, 1960 (R. 152, 363 U.S. 840).

Questions Presented

1. Was petitioner's right to the trial guaranteed by the Due Process Clause of the XIV Amendment violated in view of the conduct of the District Attorney, the resulting publicity, and the other circumstances under which the trial was held?

2. Was there a violation of petitioner's right to a fair trial, as guaranteed by the Due Process Clause of XIV Amendment of the Constitution of the United States of America, where in a trial of a capital offense by jury, the trial court permitted to remain in the jury box and sit in judgment, three jurors who had entered the jury box with a fixed opinion as to petitioner's guilt, and retained such opinion while being examined on *voir dire*?

Constitutional Provision and Statutes Involved

Article I, Section 3, Constitution of the State of California, California State Senate Edition, 1951, page 3, provides as follows:

> "Sec. 3. The State of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

The Constitution of the United States provides in pertinent part as follows:

Amendment XIV, Section 1:

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law ..."

Section 190, Penal Code of the State of California, in part, provides:

"Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, . . . "

Section 190.1, Penal Code of the State of California, in part provides:

"The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death and has been found sane on any plea of not guilty by reason of insanity there shall thereupon be further proceedings on the issue of penalty and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant. . . .

" . . . If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. . . . "

Section 1033, Penal Code of the State of California, in part provides:

> "A criminal action pending in a superior court may be removed from the court in which it is pending on application of the defendant, on the ground that a fair and impartial trial cannot be had in the county. . . . "

Section 1239 (b), Penal Code of the State of California, provides:

> "(b) When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

Section 1073, Penal Code of the State of California, in part, provides as follows:

> "(Particular causes of challenge: What are.)
>
> Particular causes of challenge are of two kinds:
>
> • • • • •
>
> Second. For the existence of a state of mind on the part of the juror . . . which will prevent him from acting with entire partiality . . . "

Section 1076, Penal Code of the State of California, in part provides as follows:

> ". . . but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such juror, founded upon public rumor, statements in public journals, circulars, or other literature or common notoriety; provided, it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impar-

tially and fairly upon the matters to be submitted to him . . . "

Section 1069, Penal Code of California, in part provides as follows:

> "A peremptory challenge can be taken by either party, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the court must exclude him."

Section 1070, Penal Code of California, in part provides as follows:

> "... If the offense charged be punishable by death, ... the defendant is entitled to twenty and the state to twenty peremptory challenges. ... "

Statement of the Case

On December 21, 1958, the body of Olga Duncan was found. Soon thereafter, with Luis Moya and Augustine Baldonado, petitioner was arrested.

The bizarre context in which these events occurred caused widespread newspaper publicity and excited enormous public interest (R. 6-8). The distillation of the newspaper accounts at the time of these arrests created these impressions and suspicions: Mrs. Duncan was deeply attached to her son, Frank Duncan, and had opposed her son's marriage on June 20, 1958 to Olga. On August 7, 1958, unknown to her son, she secured a fraudulent annulment of the marriage by impersonating Olga, and she agreed to pay Baldonado and Moya $6,000 to kill Olga.

Superimposed on this account were certain extraordinary statements of the District Attorney. On December 22, 1958, he issued a statement advocating the death penalty for

petitioner and the others which was published on the front page of the community's leading newspaper under the heading "D. A. Urges Death Term in Killings" as follows:

> "The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders, in the face of these events, can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a crime.
>
> "Many persons contend that the death penalty does not deter murder. Frankly, I am sick of this illogical argument. Of course penalties do not completely deter crimes. Jail sentences do not completely deter drunken drivers, burglars, robbers or other criminals and death penalties do not completely deter murderers. But that is no reason to dispense with penalties.
>
> "Retaliation is a basic instinct of the human race. In civilized societies, the government takes over from the individual the job of retaliating against a wrongdoer. From biblical times, a life for a life has been recognized as just and fair.
>
> "The alternative in California a life sentence which permits a prisoner to be paroled in seven years, simply is insufficient retaliation. I hope the people of this state rise up against the propaganda drive[1] that has flooded us lately about the so-called evils of capital punishment. They must demand that California retain the death penalty to deal with situations such as the Duncan case" (R. 6).

In an affidavit opposing a change of venue the District Attorney purported to justify this statement by the following logic:

"My statement that the death penalty is appropriate for the perpetrators of the murder of Olga Duncan, cannot prejudice the defendants. The law of California is such that the defendants are guaranteed a fair trial. If, after such a trial, the defendants are found not to have perpetrated the crime, they obviously will not be prejudiced and my statement would be inapplicable to them. If, on the other hand, they are found guilty of first degree murder, then the statement will apply to them. The fact that it was made before the taking of testimony before the trial jury is of no consequence. In any case involving murder where the prosecutor seeks the death penalty, the fact that he will do so is always disclosed before the trial jury is selected by reason of the question asked of prospective jurors as to the entertainment of such conscientious opinions as would preclude their finding the defendant guilty and imposing the death penalty. Consequently, whether prospective jurors know that I will seek the death penalty as the appropriate punishment from reading the newspapers or from hearing me say so in court is immaterial" (R. 14-15—Baldonado).

Petitioner was indicted by the Grand Jury of Ventura County on December 26, 1958 (R. 2).

On December 30, 1958 a story appeared in the same newspaper purporting to be an interview with the District Attorney in which he stated why the death penalty was proper punishment for this crime. Among other things the District Attorney said:

"When you do catch 'em, and when you do convict 'em, what are you going to do with them . . . rehabilitate 'em?"

According to District Attorney Roy A. Gustafson, the chances of rehabilitating the three persons ar-

raigned today on charges of murder-for-hire are "awfully slim . . . and I don't want to take that kind of chance."

That is one of the reasons why he is going to ask for the death penalty against Mrs. Elizabeth Duncan, and her two accused accomplices—Augustine Baldonado and Luis Moya—in the hired slaying of nurse Olga Duncan.

Gustafson repeated his plans yesterday, and added that he expected the case would probably be mentioned when the new legislative campaign opens this year to do away with the death penalty.

"The most pertinent point in the death penalty is retribution. Anyone who says we must get away from the 'barbaric thought' of retribution is not being realistic.

• • • • •

"We deal in a punishment system with retribution. Society takes over for the individual who has been wronged, and it punishes the wrongdoer. Many crimes can't have retribution: rape, for instance. So we incarcerate, or fine or execute."

Retribution, he says, is one of four major points in any punishment. Another is deterrence, a third is rehabilitation. Rehabilitation's statistics are "pretty sad," he says. And any alternative to capital punishment usually involves life sentences without pardon or parole. A lifer without hope of ever leaving prison "has no hope and becomes a vegetable. Or worse, as we'll show you later."

But as far as rehabilitation goes, Moya was paroled a year ago after serving a year out of a 1-to-10 year term for marijuana possession. Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case.

By the state's own figures, 48.8 percent of parolees wound up back in prison or jail within four years of being paroled. In the case of women, the rate was 57.5 percent. And the rate is going up, not down, he points out.

He commented that the possibility of putting California's third woman in the gas chamber does not present him with any qualms.

"This is appropriate punishment," he said, paraphrasing the judge in the Harvey Glatman case. And he adds: "What are you going to do, rehabilitate 'em?"[1]

Prior to her entry of plea, petitioner duly applied for a change of venue in accordance with Section 1033 of the California Penal Code. The application was denied without prejudice (R. 6-8).

The application was renewed before the impanelment of the jury (R. 24-29, 30). The renewed application was denied.

After the impanelment of the jury, but before it was sworn, the application was renewed again. This application was denied also (163, 164; 672-676).

On February 16, 1959, petitioner's jury trial started (R. 30), and on March 16, 1959, the jury found petitioner guilty of murder in the first degree (R. 64). On March 20, 1959, the jury sentenced petitioner to death (R. 74).

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[1] See Appendix B, Baldonado, containing the complete newspaper story from which the foregoing was taken. See R. 44-45 and page 6 of Exhibit 8 thereto. In response to the petitioner's citation of this newspaper story in connection with a motion to change venue, the District Attorney made an affidavit denying that he made any statement to the effect that Moya was using marijuana when he was arrested (R. 16, Baldonado). This affidavit made no other denials regarding the substance of the purported interview.

In the March 21, 1959 issue of the Ventura County Star-Free Press, the District Attorney is reported to have hailed the Duncan death verdict by stating that it should have the effect of heading off moves to abolish the death penalty in California (R. 68, Exh. A-36, Moya).

The heavy press coverage accorded to a sensational murder case in petitioner's trial was intensified by camera coverage of the trial proceedings.

The selection of a jury to try petitioner had commenced on February 16, 1959 (R. 154).

On direct examination on *voir dire* during the impanelment of the jury, prospective Juror Porter testified, among other things, to the following (R. 274 to 283):

(1) As a result of discussions with 15 or 20 people, and from what he read, he formed an opinion regarding the guilt of petitioner.

(2) That the juror had an opinion that petitioner was guilty.

(3) That the opinion was such that evidence would be required to overcome it.

(4) That if the juror's wife were on trial for an identical offense, he would not want her guilt or innocence determined by a jury in his frame of mind.

(5) That the reason for such answer is because he felt petitioner was guilty.

(6) That a defendant could not receive a fair and impartial trial in the juror's state of mind.

Appellant challenged Juror Porter for cause (R. 278). The challenge was disallowed (R. 283). Petitioner was thus compelled to exercise a peremptory challenge as to this juror (R. 430).

On direct examination on *voir dire*, among other things, prospective Juror Saavedra testified to the following (R. 284 to 296):

(1) After having heard all the evidence as well as the instructions of the Court; and having discussed the evidence in the light of the instructions; and having conscientiously entertained a reasonable doubt as to petitioner's guilt, the juror, nevertheless, would have a hesitancy in resolving a doubt in favor of the petitioner.

(2) That as a result of discussions with members of her family, and from what she read, the juror had formed an opinion that the petitioner was guilty.

(3) That the juror had expressed her opinion of guilt to members of her family.

(4) That it would require some evidence on the part of the defense to overcome the juror's opinion.

(5) That the juror did not know whether she could set her opinion completely aside.

(6) That the juror's opinion, to some extent, was apt to influence her verdict.

(7) That the juror felt that if she were being tried by a jury in her present frame of mind she could not receive a fair and impartial trial.

(8) That in the juror's present state of mind, she could not act fairly and impartially.

Petitioner challenged Juror Saavedra for cause (R. 292). The challenge was disallowed (R. 296), and petitioner was compelled to exercise a peremptory challenge (R. 414).

On direct examination on *voir dire*, among other things, prospective Juror Flynn testified to the following (R. 401 to 414):

(1) That from discussions with persons, and from what he read, he had formed an opinion that petitioner was guilty.

(2) That the juror had discussed the case with many people.

(3) That the juror did not know whether the persons with whom he had discussed the matter had personal knowledge of the facts.

(4) That the juror did not know whether any of such persons were likely to become witnesses in the case.

(5) That the juror had confidence and trust in the people with whom he discussed the case.

(6) That while the juror sat in the box he still had the opinion that petitioner was guilty.

(7) That the opinion of guilt was such that it would require evidence to overcome it.

(8) That if the juror's wife were on trial under similar circumstances, he would not trust the fate of his wife in the hands of a jury having his present state of mind.

(9) That a jury in the juror's present frame of mind could not render a fair and impartial verdict.

Petitioner challenged Juror Flynn for cause (R. 408). The challenge was disallowed (R. 412), and again petitioner was compelled to exercise a peremptory challenge (R. 462).

On direct examination on *voir dire*, among other things, prospective Juror Behrens testified to the following (R. 472 to 482):

(1) That the juror had discussed the case with many people who came into her place of business.

(2) As a result of discussions with these people, and as a result of what she had read, the juror had formed an opinion that petitioner was guilty.

(3) That she had expressed to other persons her opinion that petitioner was guilty.

(4) That as the juror sat in the box she still entertained that opinion.

(5) That it would require some evidence on the part of the petitioner to overcome that opinion.

(6) That as she sat in the jury box she believed that petitioner was guilty.

(7) That she did not know whether her verdict would be influenced by her opinion.

(8) That such opinion would prevent the juror from acting impartially.

(9) That if the juror were on trial for an identical offense she would not trust her fate to 12 persons in her present state of mind.

(10) That under such circumstances she would feel that she could not receive an absolutely fair and impartial verdict.

Petitioner challenged Juror Behrens for cause (R. 477). The challenge was disallowed (R. 479). This juror was likewise excused on a peremptory challenge (R. 500).

During the impanelment of the jury petitioner was compelled to exercise all of her 20 peremptory challenges allowed to her by Section 1070 of the California Penal Code (R. 347, 362, 370, 391, 401, 414, 430, 462, 482, 490, 500, 510, 521, 541, 569, 576, 598, 611, 619, 650).

After petitioner had exhausted 19 of her peremptory challenges, the trial court ruled that petitioner was entitled to one more challenge (R. 627).

After such ruling, Jurors Hall, Berch and Horrell entered the box.

Among other things, Juror Hall testified in *voir dire* that (R. 641 to 650):

(1) A dear friend, a sorority sister, had been murdered recently.

(2) Her sister is a policewoman in California.

(3) Her father was a policeman in California.

(4) She had read articles in newspapers which purported to report District Attorney Gustafson's statements concerning the case.

(5) From what she read and from discussions with 12 or 15 people she had formed an opinion that petitioner was guilty.

Among other things, Juror Berch testified in *voir dire* that (R. 629 to 640):

(1) As a result of what she had read or discussed, she had formed an opinion that petitioner was guilty.

(2) That as she sat in the box she still held that opinion.

Among other things, Juror Horrell testified in *voir dire* that (R. 655 to 672):

(1) His father had been a deputy sheriff of Ventura County.

(2) He had read newspaper articles relating to the testimony of the grand jury witnesses.

(3) He accepted as true, the newspaper articles.

(4) That because of these articles he believed petitioner to be guilty, and entertained that belief as he sat in the jury box.

Petitioner was required to use her last peremptory challenge to excuse Juror York (R. 650), leaving in the jury box, Jurors Hall, Berch and Horrell.

Summary of Argument

Prior to the commencement of the trial, the District Attorney had caused to be published, or allowed to be published, proposed proof of petitioner's alleged guilt, including alleged confessions of co-defendants as well as verbatim transcripts of the Grand Jury Proceedings; and made vitriolic and extensive arguments for the imposition of the death penalty. He participated in the general release of the above, intentionally and widely. Such acts amounted to misconduct, and constituted a deliberate attempt to prejudice the community against petitioner, and a deliberate attempt to frustrate petitioner in seeking a fair trial. Seeking to correct this wrong, petitioner duly moved for a change of venue. Her requests were denied. Due process requires that in this type of situation, the state provide a "corrective process".[2]

As a result of these circumstances, petitioner was deprived of her right to a fair trial, and hence, the judgment deprives her of life without due process of law, as guaranteed by the XIV Amendment to the Constitution of the United States.

Also, traditionally persons entering the jury box with a fixed opinion as to a defendant's guilt or innocence have been disqualified, *ipso facto*, to act as jurors. The State of California has a so-called "rehabilitation" statute which purports to permit opinionated jurors to become qualified under certain conditions. That statute was interpreted herein so as to permit to sit in judgment upon petitioner's

[2] Frank vs. Mangum, 237 US 309, 335.

life, jurors who had entered the box with a fixed opinion of petitioner's guilt and maintained that opinion during their examination on *voir dire*. By such interpretation petitioner was deprived of a trial by an impartial jury in violation of the XIV Amendment.[3]

Therefore, the judgment sentencing her to death ought to be reversed with instructions that the issues be tried in a County in California less susceptible to the District Attorney's prejudicial statements; and that a jury be selected in accordance with the 14th Amendment.

ARGUMENT

I

Introduction

> "Henceforth there shall be in every countie a sober, discrett and religious person appointed by the countie court, to be atturney to the Queen to prosecute and implead in the law all criminals and to doe all other things necessary or convenient as an atturney to suppress vice and immoralitie."[4]
>
> —1704 Connecticut Law

This hearing concerns one of the most urgent and difficult problems in the administration of criminal justice; how to secure to the accused his right to a fair trial after

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[3] Thompson vs. Utah, 107 US 343.

[4] This is the first law in any of the American colonies establishing the office of public prosecutor, and is quoted in National Commission on Law Observance and Enforcement, Report on Prosecution, April 22, 1931, No. 4, page 7 (Wickersham Report). At common law, crimes were prosecuted privately by the aggrieved complainant. Lord Hale urged the replacement of private prosecutors by public prosecutors in order to do away with the evil practices of private criminal prosecution (*ibid.*) p. 6.

For a modern view as to the duties of the prosecutor, see *Re Sawyer*, 360 U.S. 620, 666.

the State has disseminated prejudicial statements to the public by means of the press and other mass media of communications, and ultimately how to prevent public prosecutors from trying their cases outside of the courtroom.

II

Published Statements of the District Attorney Constituted Deliberate Acts of the State, Calculated to Interfere With Orderly Procedure and Deprived the Petitioner of a Fair Trial.

The petitioner's right to a fair trial was invaded by the District Attorney's newspaper campaign. This Court has long recognized that due process may be denied where a trial takes place in a prejudiced atmosphere:

> "We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law" (*Frank* v. *Mangum*, 237 U.S. 309 at 335).

In *Moore* v. *Dempsey*, 261 U.S. 86, this Court in recognizing that an inflamed atmosphere might be incompatible with due process, after citing *Frank* with approval stated:

> "... But if the case is that the whole proceeding is a mask,—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the state courts failed to correct the wrong,—

neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights" (at 91).

Petitioner does not claim that her trial was "mob dominated" in the sense of *Frank* and *Moore;* however, she does urge that the extrajudicial conduct of the District Attorney was an intentional interference with petitioner's right to a fair trial and that no "corrective process", such as change of venue, was provided. The principle of the cited cases is that extrajudicial factors tending to compromise the inviolability of the courtroom may defeat due process, and this principle is not weakened because it is the state, rather than the mob, which inspires the interference.

The practice of trying cases in the mass media is, in a sense, more appalling than certain improprieties committed by the police; see, e.g., *Rochin* v. *California,* 342 U.S. 165. This because the police, ostensibly, have a valid objective—the discovery of evidence. It is the method of the police, and not the objective which sometimes offends due process. No proper objective within the purview of a public prosecutor is remotely served by trying a case outside the courtroom. Moreover, the prosecutor is a skilled lawyer and is an officer of the court who, therefore, has knowledge and duties patently incompatible with such conduct. A reversal in this case would effectively communicate this point to the public prosecutors.[5] Petitioner is not suggesting that

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[5] In reversing a conviction in *People* v. *Wilkes,* 44 Cal.2d 679, the court stated:

"It was error for the prosecution to comment on the failure of Mrs. Wilkes to testify. (Citations.) Such error has repeatedly been denounced but held not to have been prejudicial in the circumstances of the particular cases in which it has occurred. Because of such repeated holdings it appears from the brief of the People, prosecuting officials have come

this court discipline prosecutors for misconduct by reversing judgments of conviction. Rather, he suggests such treatment for its therapeutic value in this instance and its preventive effects in future cases.

B.

This court has spoken of standards of conduct applicable to prosecutors: "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring a just one." *Berger* v. *U.S.*, 295 U.S. 78, 88. These standards of conduct have become almost truistic.[6]

This court has dealt with inflammatory conduct on the part of newspapers and governmental officers. In *Shepherd* v. *Florida*, 341 U.S. 50, newspapers published as fact, and attributed the information to the sheriff, that the defendants had confessed. Justice Jackson, concurring, stated:

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to the belief that erroneous conduct in this regard is, as a matter of law, not cause for reversal. The conduct here, as in previous cases where it has been rebuked but held not prejudicial, was manifestly deliberate. *Regrettably, the circumstances make it apparent that we must recognize and deal with the fact that such conduct will not be discontinued as long as it is merely rebuked. . . .*" (Emphasis added.)

[6] "The prosecutor in a rural area should avoid appearing to be an overzealous crusader" (Frederick B. Bryant, "The Rural Prosecutor", in pamphlet, "Public Prosecutors", Practising Law Institute, 1955, p. 1). "Because of the key position which the prosecutor holds in controlling the atmosphere of a criminal trial, he should abstain from overemphasizing the sordid aspects of criminal news. . . . The prosecutor who scrupulously practices law instead of attempting to play politics will not be tempted to shape up his case for newspaper headlines and for justice afterwards. . . . Before and during the trial of a case, the prosecutor should avoid making premature disclosures which may have a bearing on the sentiment of the public or the reasoning of the jurors" (Wendell Berge, "The Prosecutor and Crime Publicity", 29 A.B.A.J. 63 (1943)).

> " . . . If the prosecutor in the courtroom had told the jury that the accused had confessed but did not offer to prove the confession, the court would undoubtedly have declared a mistrial and cited that attorney for contempt" (pp. 51-52).

Likewise, in the case at bar, if the prosecutor had made his statements before the jury and prior to the normal time for argument, the trial court would have taken similar action. The difficulty with this type of case is that trial courts have become accustomed to trial by newspaper and have become inured to such "procedure".[7] Although our trial courts function in the twentieth century, their cognition of this problem is obsolete. The lower courts must realize that old process is not necessarily due process, and just as ancient and crude methods of trial have had an historical refinement, so must the law extract and eliminate the impurity of trial by newspaper.[8] Again, Justice Jackson recognized the point in *Shepherd*:

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[7] Justice Frankfurter dissenting in *Stroble* v. *California*, 343 U.S. 181, observed:

> "And so I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of 'the traditional concept of the "American way of the conduct of a trial." ' Such passion as the newspapers stirred in this case can be explained (apart from mere commercial exploitation of revolting crime) only as want of confidence in the orderly course of justice. To allow such use of the press by the prosecution as the California court here left undisciplined, implies either that the ascertainment of guilt cannot be left to the established processes of law or impatience with those calmer aspects of the judicial process which may not satisfy the natural, primitive, popular revulsion against horrible crime but do vindicate the sober second thoughts of a community" (pp. 201, 202).

[8] Judge Walter W. Shaeffer recently wrote:

> "Due process cannot be confined to a particular set of existing procedures because due process speaks for the future as

> "... But prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated" (p. 51).

The prejudicial influence in petitioner's case was that the District Attorney carried on a brainwashing campaign to condition the local populace to his persuasion. It is difficult to imagine statements which could more effectively infect a trial. Petitioner could not have had a fair trial in Ventura County after the District Attorney had invoked the Madison Avenue technique in packaging the case.

C.

In *Stroble* v. *California*, 343 U. S. 181, this Court recognized that newspapers could so inflame and prejudice the atmosphere of a community as to deny due process. While *Stroble* affirmed the conviction under review, it is not dispositive of this case as is demonstrated by the comparison which follows.

In *Stroble*, the acts of the District Attorney were less aggravated. Consequently, this court merely deprecated his conduct in releasing to the press a confession which could have been printed four days later as a result of being

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well as the present, and at any given time includes those procedures that are fair and feasible in the light of the then existing values and capabilities. Some features of present procedures are now accepted by force of custom, or because no practical way has been found to improve them. Technological change or a refinement in our sense of justice may make their retention intolerable" (70 Harv. Law Rev. 1 at p. 6).

read into the record at the preliminary hearing (343 U. S. at 193). In this case the District Attorney carried out a deliberate press campaign to obtain the death penalty (see Appendices A and B of Baldonado).

Moreover, in *Stroble* this Court deemed it significant that the defendant did not seek a change of venue (343 U. S. at 194). In *United States* v. *Handy*, 351 U. S. 454, this Court again considered it significant that the defendant in a capital case who raised the issue of trial in a prejudiced atmosphere had not sought to change the venue of that trial. In this case motions for change of venue were seasonably filed. The basis for the motions was that a fair and impartial trial could not be obtained in Ventura County because of the prejudicial atmosphere engendered by the published statements of the District Attorney.

And in *Stroble* it was noted that public passion had had an opportunity to subside between confession and trial (343 U.S. at 192-193). Publicity concerning the Duncan murder reached its apogee only several days before the petitioner's trial which commenced on February 16, 1959.

The foregoing discussion highlights the two major distinctions between *Stroble* and this case. First, in petitioner's case the most harmful publicity resulted from the deliberate and intentional activities of the prosecution, while *Stroble* dealt primarily with newspaper accounts *per se*.[8a] The importance of this distinction is probably embedded in the difficult question of fair trial versus free press, because though *Stroble* was not a newspaper contempt case, a reversal might have served as an indirect re-

[8a] ". . . (W)e are . . . faced . . . with the question whether newspaper accounts aroused such prejudice in the community that petitioner's trial was 'fatally infected' . . ." (*Stroble*, at p. 191).

straining influence on the press. The thrust of the case at bar is directed primarily against the activities of the prosecutor as distinguished from the press.

The other important distinction is that petitioner vigorously sought a change of venue. In *Stroble* this court stated:

> " . . . But, in an effort to determine whether there was public hysteria or widespread community prejudice against petitioner at the time of his trial, we think it significant that two deputy public defenders who were vigorous in petitioner's defense throughout the trial, saw no occasion to seek a transfer of the action to another county on the ground that prejudicial newspaper accounts had made it impossible for petitioner to obtain a fair trial in the Superior Court of Los Angeles County" (p. 194).

D.

Due process should not saddle the defendant with the difficult burden of proving prejudice. The opinion below requires petitioner to demonstrate she was prejudiced by the state's wrongful conduct, that is, the conduct of the District Attorney. The petitioner is required to show that a juror was influenced by the prejudicial statements. Note, the demand for the showing comes from the wrongful actor. The state acts in a way calculated to deprive the defendant of a fair hearing, and then places upon her the burden of proving injury. Of course, this proof requirement is consistent with basic notions of remedies underlying our law, i.e., a person seeking legal redress usually must prove that he has been damaged. The problem with transporting such a notion to this area is the difficulty of proof. Anyone who has observed a *voir dire* proceeding is struck by the crude,

hit or miss, hunch method of getting rid of an unfavorable (i.e., "prejudiced") prospective juror. It is doubtful whether the use of professional psychometric personnel with their batteries of tests would provide any more certitude. Nevertheless, the state after engaging in acts presumably creating prejudice demands that the defendant, who is typically indigent, clearly demonstrates he has been prejudiced. Considering the difficulty of such proof the state has everything to gain, and little to lose, by selling its case in the mass media.

Accordingly, by this approach, the petitioner is required to produce a juror who has sufficient insight to recognize subconscious bias, or mistakenly believes he is biased, or dishonestly says he is biased, or dishonestly conceals his bias,—an intolerable burden with which to saddle the aggrieved persons. That even judges may have difficulty in recognizing their own bias has been noted:

> " . . . No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations. However, judges are also human, and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process . . . " (concurring opinion in *Pennekamp* v. *Florida*, 328 U.S. 331, 357).

The harmful effect of trial by newspaper and other mass communication media has been the subject of scientific study, and there is little doubt that such communications can have a harmful effect on a trial.[9] Experiments show that

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[9] Murphy and Newcomb, *Experimental Social Psychology* (1937), pp. 961, 967 and 969; Cantrill and Allport, *Psychology of Radio*, pp. 177-180; Doob, *Public Opinion and Propaganda* (1945), p. 337. A comprehensive discussion of the entire problem of press and radio influence may be found in 63 Harv. L. Rev. 840. See, also, a recent note in 34 N.Y. Univ. L. Rev. 1278 (November 1959).

statements attributable to a public figure are more readily acceptable and have more impact than statements from obscure persons.[10] Obviously, this finding is applicable to a District Attorney in his own county. Petitioner has prepared as Appendix C a survey of material dealing with this subject.

E.

Although petitioner stresses the effect of newspaper publicity on his right to a fair trial, this case does not involve a collision of fair trial and free press principles. However, the cases involving freedom of press and fair trial are, nevertheless, instructive. See, e.g., *Craig* v. *Harney*, 331 U.S. 367. These cases recognize that newspaper activity can affect the administration of justice.[11] The majority in *Bridges* v. *Calif.*, 314 US 252, although finding that the administration of justice had not been compromised, stated:

> "The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."

The English experience is also instructive.[12] An English writer has formulated the problem in the following manner:

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[10] Murphy and Newcomb, *op. cit. supra*, note 8, at 970.

[11] Cf. United States v. Powell, USDC ND Cal., 171 F. Supp. 202.

[12] See appendix to State of Maryland v. Baltimore Radio Show, 338 U.S. 912.

"Perhaps no feature of modern journalism has been so severely criticized as the attempt to try cases in the press before they have been heard in the courts. In their desire to furnish their readers with the latest startling news, newspapers, unless properly controlled by the law, may publish incorrect statements of fact or express biased opinions which will hinder a fair trial. This is particularly true in those cases. . . . which are to be heard by a jury, for under modern conditions, every juryman reads a newspaper, and it is not unlikely that he will be influenced by what it says. The English courts have, therefore, taken a strong view in an attempt, which has proven remarkably successful, to put down the evil." [13]

Lord Ellenborough in an early case observed:

"If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before *ex parte* statements of the evidence against the accused, which the latter had no opportunity to disprove or to controvert" (*Rex* v. *Fisher,* 11 RR. 799 (K.B. 1811)).

In the light of modern psychology, Lord Ellenborough's ideal juror, having a mind "pure and unprejudiced", may be an illusory objective. Yet, granting the jury system, should not the courts bend every effort toward seeking this lofty ideal?

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[13] Goodhart, Newspapers and Contempt of Court in English Law, 48 Harv. L. Rev. 885, at p. 885.

III

The Failure of the State to Supply a "Corrective Process" Constituted a Denial of Due Process.

After the District Attorney's statements, it was incumbent on the state to apply some "corrective process" (*Frank* v. *Mangum*, 237 U.S. 309). The accepted and available process was to change the venue of the trial. This Court in *Stroble* v. *California*, 343 U.S. 181, impliedly recognized that such procedure would be appropriate in cases of this nature.

Since *Stroble*, several cases have arisen in the courts dealing with community prejudice. These cases suggest some kind of relief should be given to ameliorate the prejudice: either change of venue or an appropriate postponement of trial. In *Delaney* v. *United States*, 199 F. 2d 107 (CA 1 1952), after indictment and before trial, a Senate Committee conducted hearings concerning conduct of the accused which received prominent attention in the press. The accused moved for a continuance of the trial to allow the prejudice to subside and his motion was denied. In reversing, a unanimous First Circuit, through Judge Magruder, stated:

> " . . . (T)he strongest point . . . relied upon by appellant, is that the trial judge committed error in not granting a continuance of the trial for a longer period, until such time as it could be estimated with greater assurance that the prejudicial effect of the aforesaid publicity . . . had so far worn off that the trial could proceed free of the enveloping hostile atmosphere and public preconception of guilt prevalent on January 3, 1952, when appellant was brought to trial" (p. 112).

The appellate court observed that the trial judge had conscientiously tried to minimize the prejudicial effect of the publicity by cautionary remarks and instructions, but discounts the prophylactic effect:

> " . . . But as stated by Mr. Justice Jackson, concurring, in *Krulewitch* v. *United States*, 1949, 336 U.S. 440, 453, 69 S. Ct. 716, 723, 93 L.Ed. 790: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction' . . . " (*ibid.*).

Here the petitioner's principal effort to mitigate the prejudicial atmosphere was to seek removal rather than continuance but the same fundamental question is involved.

In *Palakiko* v. *Harper*, 209 F. 2d 75 (CA 9), in affirming a conviction where defendant charged newspapers had created a prejudicial atmosphere, the court gave great weight to defendants' failure to ask for change of venue.

In *United States* v. *Rosenberg*, 200 F. 2d 666, 670 (CA 2), there was prejudicial newspaper publicity *during* the trial and defendants elected not to ask for a mistrial. Again, as in most of these cases, the court laid great stress on the fact that defendants failed to ask for some kind of relief from the prejudicial effect.

Recently a member of this court enunciated a view in accordance with the preceding analysis. See Douglas, *The Public Trial and the Free Press*, 46 A.B.A.J. 840, 841:

> "At other times the papers may so beat the drums of prejudice and passion as to make it doubtful whether a trial in the local courthouse can be fair to a particular defendant. See *Shepherd* v. *Florida*, 341 U.S. 50; *Stroble* v. *California*, 343 U.S. 181, 191-195.

Local feelings may run so high as to necessitate a change in venue or a continuance to allow emotions to subside.

"The point is that our remedy for excessive comment by the press is not the punishment of editors, but the granting of new trials, changes in venue, or continuances to parties who are prejudiced."

The impact of the activities of the District Attorney of Ventura County upon due process was manifest in the examination of a prospective juror in *voir dire*. The spontaneous expressions by that juror are more eloquent and graphic than a myriad of affidavits (R. 256, fol. 167, to R. 257, fol. 168):

"MR. GUSTAFSON: You say now that if Judge Blackstock tells you that Mrs. Duncan is presumed to be innocent until I present some evidence convincing you beyond a reasonable doubt that she is guilty, that if I produce no evidence whatsoever, so that there is no evidence to change your mind, that you will walk out in the jury room and find her guilty?

THE PROSPECTIVE JUROR: *Well, you already presented your evidence.*

MR. GUSTAFSON: Well, I am saying assume that I have no evidence whatever that I present to you, when I present the case—in other words, I fall down completely and I don't present any evidence against her—are you going to go and vote her guilty, despite the Judge's telling you that you must consider her innocent until the evidence is before you, proving her guilty beyond a reasonable doubt?

THE PROSPECTIVE JUROR: *Well, let's put it this way. I have heard a good deal of your evidence in the*

papers and television, and if you presented no evidence, you still have presented evidence that I know, and I can't forget." (Emphasis furnished.)

IV

Petitioner's Right to a Fair Trial as Guaranteed by the Due Process Clause of the XIV Amendment Was Denied by the Manner in Which Constituency of the Jury Was Established.

A. The Selection of the Jury.

Epitomizing the initial examination on *voir dire* of prospective juror Porter; as a result of discussions with 15 or 20 people, and from what he had read, he believed that petitioner was guilty; that the opinion was such that evidence would be required to overcome it; that if his wife were on trial for an identical offense, he would not trust her fate to people in his frame of mind; and that with his frame of mind, petitioner could not receive a fair trial (R. 277, 278).

Epitomizing the initial examination on *voir dire* of prospective juror Saavedra; after hearing all the evidence as well as the instructions of the Court, and even conscientiously entertaining a reasonable doubt as to petitioner's guilt, she would hesitate in resolving a doubt in favor of the petitioner; that from what she had read and from discussions with members of her family, she had formed an opinion that petitioner was guilty, and that she had expressed her opinion of guilt; that she did not know whether she could set her opinion completely aside, and that her opinion was apt to influence her verdict; that she could not act fairly and impartially; and that if she were being tried by a jury in her present state of mind, she could not receive a fair and impartial trial (R. 287-290).

Epitomizing the initial examination on *voir dire* of prospective juror Flynn; that from discussions with persons, and from what he had read, he had formed an opinion that petitioner was guilty; that he had discussed the case with many people and that he did not know whether these people had personal knowledge of the facts or whether they were likely to become witnesses; that furthermore, he had confidence and trust in these people; that as he sat in the box he still had the opinion that petitioner was guilty; that in his frame of mind he could not render a fair and impartial verdict; and that if his wife were on trial, he would not trust her fate in the hands of a jury having his state of mind (R. 406-408).

Epitomizing the initial examination of prospective Juror Behrens; that she had discussed the case with many people who had come into her place of business; that as a result of these discussions and as a result of what she had read, she had formed an opinion that the petitioner was guilty and had expressed such opinion to others; that as she sat in the box she still entertained that opinion; that she did not know whether her verdict would be influenced by her opinion, but that her opinion would prevent her from acting impartially; that if she were on trial, she would not trust her fate to 12 persons in her state of mind, and that she would not, under those circumstances, receive a fair and impartial verdict (R. 476, 477).

After these four prospective jurors had indicated unambiguously that they had entered the box with the opinion that the appellant was guilty and were unable to act impartially, the District Attorney, aided by the trial Court attempted to "rehabilitate" these jurors by securing "declarations" from them, that notwithstanding their opinions they would act impartially and fairly.

The technique used in securing such "declarations" included "questions" which not only suggested the answers, but also were framed in such manner, that by failing to give the answers suggested by the questions the prospective juror would put himself publicly in the light of being dishonest and unmoral. Frequently, the "question" propounded by the District Attorney or the trial Court would end with an expression such as "Wouldn't you?" or "Would you not?"; and with the combined pressure of the highest enforcement official of the rural county and the highest judicial officer in such county being exerted, the prospective juror replied on cue.

For instance, after prospective Juror Porter's definite delineation of bias, the District Attorney expostulated at great length (R. 278) on the applicable law, after which the following "examination" occurred (R. 279):

"MR. GUSTAFSON: Yes, in other words, you would have to decide what the facts are in the case, whether you believed such or, on the other hand, whether you believed something else, but in deciding what the verdict would be, based on the facts that you have decided, you would take the law as given to you by Judge Blackstock whether you agreed with it or not, would you not?

THE PROSPECTIVE JUROR: That's right.

* * * * *

MR. GUSTAFSON: You would act fairly about that then, wouldn't you?

THE PROSPECTIVE JUROR: Certainly would.

MR. GUSTAFSON: And you would act impartially about it?

THE PROSPECTIVE JUROR: I hope so.

* * * * *

MR. GUSTAFSON: You would be fair in that respect, would you not?

THE PROSPECTIVE JUROR: Yes, sir.

* * * * *

MR. GUSTAFSON: And that is the state of mind you have, isn't it?

THE PROSPECTIVE JUROR: Yes, sir."

After the District Attorney had terminated the phase of the "examination" above quoted, and the pressure having been removed, the prospective juror repeated his bias as follows (R. 282):

"MR. SULLIVAN:

Q. On your present frame of mind as to whether or not you would want to be tried by a jury of your present frame of mind.

A. No. I wouldn't want to in my present frame of mind.

Q. You wouldn't want your wife to be tried before a jury with your present frame of mind, would you?

A. No, sir.

Q. You wouldn't want to yourself be tried before a jury of your present frame of mind, would you?

A. No, sir."

After prospective Juror Behren's definite delineation of bias, the District Attorney continued the "examination" in the following vein (R. 478):

"* * * * *

Q. And in that respect you could be fair, could you not?

A. Yes, I could.

Q. And you would be fair?

A. Yes.

Q. And you could be and you would be impartial?
A. Yes."

After prospective Juror Saavedra's definite delineation of bias, the District Attorney conducted the following "examination" (R. 291-292):

* * * * * *

MR. GUSTAFSON: So you would then be fair?

THE PROSPECTIVE JUROR: Sure I would.

MR. GUSTAFSON: And you would be impartial, sitting as a juror in this case?

(The prospective juror nodded affirmatively.)

benefit of the presumption of innocence that she is entitled to, that Judge Blackstock tells you about, wouldn't you?

THE PROSPECTIVE JUROR: Yes.

MR. GUSTAFSON: So your frame of mind is that if you are selected as a juror, you would be fair and impartial?

THE PROSPECTIVE JUROR: Yes."

After the pressure was off, on further examination the prospective juror again delineated her bias (R. 292, fol. 228).

After prospective Juror Flynn's definite delineation of bias, and after the District Attorney had "examined" the prospective juror in the usual manner (R. 401-411) the trial Court continued the "examination" as follows (R. 411-412):

"THE COURT: Well, Mr. Flynn, you would be willing to follow all of the instructions of the Court wouldn't you?

THE PROSPECTIVE JUROR: Yes.

THE COURT: As far as the law is concerned?

THE PROSPECTIVE JUROR: Yes.

THE COURT: And if I tell you that the defendant is not required to prove anything, you would follow that instruction, wouldn't you?

THE PROSPECTIVE JUROR: Yes.

THE COURT: Did you mean to say that you would require the defendant to prove her innocence before you would find her not guilty? Did you mean to say anything like that?

THE PROSPECTIVE JUROR: No, not at all, not at all."

Challenges for cause to prospective Jurors Porter, Behrens, Saavedra and Flynn by petitioner were disallowed, and petitioner was required to utilize 4 of her challenges to remove them from the jury box.

After petitioner had exhausted 19 peremptory challenges, the trial Court ruled that petitioner was entitled to one more (R. 627).

At the time of such ruling, prospective Juror York had already been seated in the box. After the ruling Jurors Hall, Berch and Horrell entered the box.

Prospective Juror York had already testified on *voir dire* that he had formed an opinion that petitioner was guilty (R. 173, fol. 34).

Among other things, Juror Hall testified in *voir dire* that (R. 641 to 650):

(1) A dear friend, a sorority sister, had been murdered recently.

(2) Her sister is a policewoman in California.

(3) Her father was a policeman in California.

(4) She had read articles in newspapers which purported to report District Attorney Gustafson's statements concerning the case.

(5) From what she read and from discussions with 12 or 15 people she had formed an opinion that petitioner was guilty.

Among other things, Juror Berch testified in *voir dire* that (R. 629 to 640):

(1) As a result of what she had read or discussed with 8 or 10 people she had formed an opinion that petitioner was guilty.

(2) That as she sat in the box she still held that opinion.

Among other things Juror Horrell testified in *voir dire* that (R. 655 to 672):

(1) His father had been a deputy sheriff of Ventura County.

(2) He had read newspaper articles relating to the testimony of the grand jury witnesses.

(3) He accepted as true, the newspaper articles.

(4) That because of these articles he believed petitioner to be guilty, and that he entertained that belief as he sat in the jury box.

Similarly, on continued "examination" of these additional jurors, the District Attorney suggested answers, and with some prodding by the trial Court, the jurors purported to rehabilitate themselves.

With respect to Juror Berch, the following occurred (R. 631):

"Q. If you are accepted as a juror in this case, would you require the prosecution to prove to your satisfac-

tion, to a moral certainty and beyond a reasonable doubt the guilt of Mrs. Duncan?

A. No, sir.

Q. You would not require them to do that?

A. The District Attorney has to prove . . .

THE COURT: She didn't understand.

(By Mr. Gustafson)

Q. Now with respect to my proving Mrs. Duncan guilty, you aren't going to require me to do more than the law requires, are you: that is, you are not going to require me to prove her guilty beyond any doubt whatever but only a reasonable doubt?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

* * * * *"

With respect to Juror Hall, the following occurred (R. 672):

"(By Mr. Gustafson):

Q. You will decide it wholly on the basis of the evidence presented in court and by the instructions given to you by Judge Blackstock?

A. Yes, sir.

Q. And you will apply those instructions of law whether you think they are wise or unwise?

A. That is right.

Q. Good or bad? Right?

A. Yes, sir."

Prospective Juror York was excused by petitioner's last challenge (R. 650).

By way of epitome, upon examination of Jurors Porter, Behrens, Saavedra and Flynn, it appeared that they had

entered the jury box with fixed opinions as to petitioner's guilt and maintained that opinion while they were in the box, but nevertheless, the petitioner was required to utilize 4 peremptory challenges to excuse them; that thereafter, Jurors Hall, Berch and Horrell entered the box, and with Juror York comprised a group of four jurors who had entered the box with fixed opinions as to petitioner's guilt and maintained that opinion while they were seated; that at such time petitioner had only one peremptory challenge left which she utilized in excusing Juror York, leaving seated in the box, three jurors (Hall, Berch and Horrell) who had entered the box with fixed opinions and maintained them, and with whom she was powerless to deal.

B. California's "Rehabilitation" Statute.

The relevant part of Section 1076 of the California Penal Code reads as follows:

> "... but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such juror, founded upon public rumor, statements in public journals, circulars, or other literature or common notoriety; provided, it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him . . . "

For reasons impelled by basic fairness, at common law a juror was *ipso facto* disqualified if he entered the box with an opinion as to the defendant's guilt or innocence; and subsequent statements by the juror on *voir dire*, purporting to "rehabilitate" him were inhibited.[14]

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[14] People vs. Miller, 125 Cal. 44; People vs. Landis, 139 Cal. 426. For a comprehensive analysis of typical English and American cases, see People vs. Vermilyea, 7 Cowen 108 (N.Y.), page 121.

For reasons of expediency, there has been a "departure" from the common law rule. "Rehabilitation" of a juror is permitted where actually his "opinion" is nothing more than an "impression" obtained from general circulating reading material or common rumor. This "departure" is expedient. With the expansion of newspaper enterprise, intelligent people generally read and thus gain "impressions".[15]

However, the "departure" from the common law rule must be minimal because of Constitutional considerations.

In consonance with the above, the California cases have established the following principles:

When it is manifest that a juror has entered the box with an opinion as to the guilt or innocence of the defendant, the trial court has no jurisdiction to elicit from the juror, a declaration to the effect that notwithstanding such juror's opinion, he can and will impartially and fairly, act upon the matters submitted to him unless:

1. The biased opinion has been founded upon:
   (a) Public rumor, or
   (b) statements in public journals, or
   (c) statements in circulars, or
   (d) statements in other literature, or
   (e) common notoriety, or
   (f) a combination of any of the above.

2. The biased opinion has been founded *solely* and *exclusively* on one of the above, and

[15] Reynolds vs. United States, 98 U.S. 145.

3. The record affirmatively shows that fact clearly.

4. The burden of creating the record is upon the one seeking to elicit the declaration under Section 1076. (In this case, the District Attorney.)

Section 1076 is in derogation of the common law rule, and cannot be extended beyond the case stated therein, to wit, the "opinion" must be founded on *public rumor, statements in public journals,* or *common notoriety.*[16]

Where it is not clear whether the "opinion" was engendered in discussions with specific persons, or in general circulating material or common rumor, the California Courts have ruled against a purported "rehabilitation" of the juror.

In *People* v. *Wells,* 100 Cal. 277, upon entering the box a juror stated that he had formed an opinion as to the guilt of the defendant. The trial court permitted the juror to make a declaration through the usual prosecution questions tending to show the juror's willingness and ability to act impartially despite his opinion. Upon such declaration the trial court found the juror to be qualified. In reversing a conviction because of this finding, the Appellate Court at page 231 stated as follows:

> "The juror would not only be disqualified at common law, but disqualified under the Penal Code, for he has not brought himself within the provisions of Section 1076, as those provisions require an *affirmative showing* to the court that his opinion is based upon public rumor, common notoriety, or statements from public journals." (Emphasis furnished.)

In *People* v. *Miller, supra,* a juror stated that *he had read newspaper accounts* of the homicide constituting the

[16] People vs. Landis, supra.

subject matter of the prosecution, *heard the matters discussed by persons, but did not know whether such persons assumed to know the facts or not, that from what he had heard or read* he formed an opinion unfavorable to the defendant; and that it would take a little evidence to remove that opinion.

Thereupon, the juror declared that if sworn he would try to lay aside his opinion entirely and act solely upon the evidence, etc., and that he would take the instructions of the court as to the law. Upon this declaration the trial court found the juror qualified. The Appellate Court reversed the conviction and after delineating the common law disqualification, and the effect of §1076, stated at pages 46-47 as follows:

> "The court is not allowed to hold a juror is qualified when he is impressed with an opinion as to the guilt or innocence of a defendant, unless that opinion is based *alone* upon one or more of the cases enumerated in the aforesaid section . . .
>
> *"As far as the record discloses, any one of the parties with whom the juror conversed as to the circumstances . . . may have been an eye-witness . . . The record must show affirmatively a contrary state of this,* or the exception in section 1076 to the common law rule cannot be invoked." (Emphasis furnished.)

The Court then stated:

> "There is nothing in the evidence which would justify the conclusion that the opinion of the juror was founded *alone* upon public rumors, statements in public journals, or common notoriety." (Emphasis furnished.)

In *People* v. *Riggin*, 159 Cal. 113, the Court at pages 117-118 stated as follows:

> "But the inquiry as to the ability of the juror to lay aside an opinion which he has, amounting to actual bias, and to act impartially and fairly in the matter, is pertinent and material, under Section 1076—*only* where . . . an opinion . . . is based *solely* upon public rumor, common notoriety or statements in public journals. . . . It must be founded *exclusively* upon one or more of the sources of information above stated." (Emphasis furnished.)

In *People* v. *Sullivan*, 59 Cal. App. 633, the opinion of the challenged jurors were based *in part* upon what persons had said. The Court held that a declaration under §1076 was not in order because the opinions were not based solely upon public rumor, etc.

See also *People* v. *Harrison*, 13 Cal. App. 555.

Nearly all of the disputed jurors herein obtained their information *partly* from specific persons and *partly* from reading material. Some of the disputed jurors spoke to a great number of people in whom they had great reliance and trust. They did not know whether such a great number of people had personal knowledge of the facts, or might even be witnesses.[17]

In its opinion the Court below stated as follows (R. 148, fol. 113):

> "There is nothing in the record to suggest that anyone with whom they talked had personal knowledge regarding the case, and their statements indicated they

[17] Ventura is a relatively small rural county.

did not understand that these people had such knowledge. . . . "

In this statement lies the error of the court below.

In the first place, under California law, the burden was upon the District Attorney (who was seeking to "rehabilitate" the jurors under Section 1076) *to make a showing that the persons* from whom the jurors obtained their information that partly constituted the basis for their prejudiced opinion, had no personal knowledge of the facts; and thus the Court below improperly placed the burden upon petitioner to clarify the record.

Secondly, accuracy requires some interpolation of the statement of the Court below. With such interpolation, the statement would be as follows:

"There is nothing in the record to suggest, that anyone with whom they talked, *did or did not have* personal knowledge regarding the case; and their statements indicated they did not know *whether or not* these people had such knowledge."

With this accurate characterization of the record, the court below would be without rationalization to make the following statement (R. 145, fol. 128):

". . . We have concluded that the court did not abuse its discretion in removing the four prospective jurors for actual bias . . . "

C. The Violation of Federal Due Process.

However, whether or not the state action was within the framework of the California Statutes or procedure is not determinative of petitioner's rights under the XIV Amendment.

In *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U.S. 234, this Court stated:

> "... But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with the Amendment. In determining what is due process of law regard must be had to substance, not to form ..."

With respect to the question of the denial of due process by the imposition upon petitioner of a biased and prejudicial jury, no intense legal polemics are required. Defendants being tried by a jury are entitled to an impartial jury. This right stems from the Magna Carta.[18] It is a right to which States must yield in legislating even on procedural matters.[19]

This court has had before it for consideration, cases of other states involving the "rehabilitation" of jurors under Statutes similar to Section 1076 of the California Penal Code; and in each of such cases where this court has upheld the "rehabilitation" of a juror there was a significant delineation of facts:

(a) indicating clearly, specifically and affirmatively that the juror had based his "opinion" upon general circulating reading material, or something equivalent.

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[18] Thompson vs. Utah, 107 U.S. 343; Ex parte Bain, 121 U.S. 1.

[19] In Hayes vs. Missouri, 120 U.S. 68, the Court stated as follows:

"In this country the power of the Legislature of a State to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury ..."

(b) indicating that the juror had not expressed an opinion of guilt outside the jury box.

(c) indicating that what the juror thought was an "opinion" was merely an "impression."

Thus, this Court has made minimal, the "departure" from the traditional rule that a juror, once having expressed an opinion of guilt, or having entered the jury box with an opinion as to defendant's guilt or innocence is *ipso facto* disqualified.

In *Ex parte Spies*, 123 U.S. 131, in contemplation of an Illinois Statute, Hurd, R.S. Ill. 1885, page 752, Chap. 78, Sec. 14 (similar to Section 1076 of the California Penal Code) this Court, among other things, pointed out that the two jurors under consideration had formed their opinions of guilt *exclusively* from what they read in the newspapers and not from discussions with other people; *and that the jurors had not expressed an opinion to others.*

In *Thiede* v. *Utah*, 159 U.S. 510, in contemplation of Sec. 5024, Compiled Laws of Utah (very similar to Sec. 1076 of the Penal Code of California) this Court stated:

> "... These jurors testified substantially that at the time of the homicide they had read accounts thereof in the newspaper, and that some impression had been formed in their minds from such reading, but each stated that he could lay aside any such impression and could try the case fairly and impartially upon the evidence presented ..."

In *Hopt* v. *People of Utah*, 120 U.S. 430, this Court stated:

> "... On his examination it appeared that the juryman ... had taken the newspaper statements for facts;

that he had no opinion other than that derived from the papers, and that evidence would change it very easily . . . "

On an appeal from a conviction in a federal court, in *Holt* v. *United States,* 218 U.S. 245, this Court stated:

". . . in his examination it appeared that the juryman had not talked with anyone who purported to know about the case of his own knowledge, but that he had taken the newspaper statements for facts; that he had no opinion other than that derived from the papers; and that evidence would change it very easily . . . "

D. THIS COURT SHOULD NOT SUSTAIN THE METHOD OF "REHABILITATION" HEREIN.

In *United States* v. *Chapman,* 158 Fed. (2) 417, culling from various opinions of this court, the United States Court of Appeals for the Tenth Circuit stated:

"... Impartiality in the sense that we use it is not a technical conception. It is a state of mind or mental attitude, for the determination of which there is no fixed formula. *United States* v. *Wood,* supra (299 U.S. 123). Whether a juror is prejudiced or partial in the sense that one of the parties is denied a fair and impartial trial, is not a procedural matter to be determined by statutory construction. *It is one of substantive law under the Constitution, to be resolved according to the highest standards of human conduct.* It is a question first addressed to the good sense of the trial judge, *subject to review under the supervisory power inherent in appellate jurisdiction.* Cf. *McNabb* v. *United States,* 318 U.S. 332 . . . , *Thiel* v. *Southern Pacific Co.,* 66 S. Ct. 984 . . . "

"... A juror's answer to questions touching his state of mind is primary evidence of his competency but the ultimate question is a judicial one for the court to decide, and in case of doubt, justice demands that the challenge be allowed . . . *Crawford* v. *United States*, 212 U.S. 183 . . . *Only by a punctilious regard for a suspicion of prejudice can we hope to maintain the high traditions of our jury system.* . . . " (Emphasis added.)

In *People* v. *Brotherton*, 43 Cal. 531 at 533, in discussing actual bias of a juror the Court stated as follows:

"... Experience . . . shows that . . . even the most intelligent class of jurors . . . when questioned by the Court or counsel they often readily adopt the views suggested at the moment by either, rendering it difficult, if not impossible, for the trial Court to determine whether the challenge should be allowed or overruled."

Then, after discussing the metaphysical aspect, the Court stated further:

"... Under such circumstances, and when after proper investigation had, doubts, more or less grave in their character, as to the actual state of mind of the juror still remain, it is better that the challenge, if insisted upon, be allowed, for by that course injustice can rarely be done the prisoner; . . . "

And in *Quill* v. *Southern Pacific Co.*, 140 Cal. 268 at 271, the Court stated as follows:

"... Even in many of those cases, notwithstanding the positive declaration of the juror and provision of the Penal Code (Pen. Code, sec. 1076), this court has felt compelled to reverse the ruling of the trial judge,

> because upon a consideration of the whole testimony, it has seemed manifest that the juror could not do that which he so positively declared his ability to do . . . "

Considering the positive attitude manifested by the jurors on initial examination, the manner of adducing the "declaration" by the District Attorney, and the vacillations, it cannot be properly said that there were no grave doubts as to the actual state of mind of these jurors; and that upon a consideration of the whole testimony, it is manifest that these jurors could not do that which they declared they could do in response to leading questions.

In *People* v. *Helm*, 152 Cal. 532, the Court approved the following excerpt from *People* v. *Holt*, 13 Mich. 224:

> "... wherein, after full examination of the testimony given upon the challenge leaves a reasonable doubt of the impartiality of the jury the defendant should be given the benefit of that doubt."

The approval of the utilization of a jury of the type herein described in a capital case would be an anomaly in Anglo-Saxon jurisprudence.

Conclusion

Appellant respectfully submits that she was denied due process under the XIV Amendment to the Constitution of the United States in that she was denied a fair trial, resulting from the failure of the Courts of the State of California to grant her motion for a change of venue; and from the imposition upon her of a biased and prejudiced jury.

Appellant respectfully urges that for the reasons set forth herein this cause should be reversed by this Honorable Court.

Respectfully submitted,

A. L. Wirin
Arthur Warner
S. Ward Sullivan
Frank Duncan
Leonard Nasatir

APPENDIX C

(1)

Howland and Weiss, "The Influence of Source Credibility on Communication Effectiveness", in *Public Opinion and Propaganda* (The Dryden Press, 1954)

"An important but little studied factor in the effectiveness of communication is the attitude of the audience toward this communication. Indirect data on this problem came from studies of 'prestige' in which subjects are asked to indicate their agreement or disagreement with statements which are attributed to different individuals. The extent of agreement is usually higher when the statements are attributed to 'high prestige' sources."

(2)

Charles W. Smith, Jr., *Public Opinion in a Democracy* (Prentice-Hall, Inc., 1939)

"Public opinion, then, is not the sum total of the individual opinions of isolated men. It is made up of the opinions of men living an associational life and affected by their contact with one another. Common interest, common elements of environment and inheritance, similar sources of information, and discussion among individuals give it unity of force" (p. 17).

(3)

Weld, A Study of the Way in Which a Verdict Is Reached by a Jury, 53 American Journal of Psychology 518 (1940)

"We also found as Weld and Roff found (in 51 American Journal of Psychology 609 (1958)) that early in the (moot court civil) trial many jurors reached a fairly definite decision, and that thereafter the effect of the testimony was merely to change their certainty. This happened with at least 25% of the jurors, half of whom were disposed in the

one, and half in the other way. Even those who as the trial progressed developed an attitude of doubt were still inclined to favor the one side or the other and in the jury room did so. We found no juror who attempted to maintain an attitude of doubt on the theory that he should make no decision until he had heard all the evidence, but we can substantiate the earlier findings of the cautious juror, and of the juror who is easily swayed by the testimony. In addition we discovered jurors who were influenced in reaching their verdict less by the proof than by their notion of what under the circumstances seemed to them to be 'right' or just" (p. 535).

(4)

Levine and Murphy, "The Learning and Forgetting of Controversial Material", 38 Journal of Abnormal & Social Psychology 507 (1943)

"An individual notes and remembers material which supports his social attitudes better than material which conflicts with these attitudes" (p. 515).

(5)

LeViness, Crime News, 66 U.S.L. Rev. 370 (1932) quotes H. L. Mencken

"Journalistic codes of ethics are all moonshine."

(6)

David Ensor, *I Was a Public Prosecutor*, Robert Hale Ltd. (1958)

"There is one other problem which has caused me some considerable concern for many years and that is prejudice against an accused person as a result of press publicity arising from the committal proceedings. It is a problem which is as old as the hills but has been brought to the attention of the Public by the remarks of Mr. Justice Devlin in a recent case at the Old Bailey. There have been a number of sensational cases in the last thirty years to my knowledge when, because of publicity, it was very difficult

to ensure that the accused received a fair trial. In cases where some juicy evidence is given before the Magistrates and plastered all over the daily Press and then later excluded at the trial because it is inadmissible, the danger is very real. The worst case of this on record is, I believe, the "Blazing Car" case and the trial of Arthur Rouse. There before the committing Justices exciting evidence was given of the accused's relations with numerous young women, his harem, as he so aptly called it, and lurid details were given of his various illegitimate children. All given in evidence because the prosecution believed it necessary to prove a motive for Rouse's disappearance and his subsequent actions. It may or may not have been necessary but it was certainly food for the newspapers and the gaping public and, incidentally, the jury yet to be chosen. Then at the trial it is not used, no doubt because that great and eminently fair prosecutor, then Mr. Norman Birkett, regarded it as unfair. By that time, of course, the damage was done and it is difficult to imagine just how a trial could be properly conducted under such conditions. In the case of Rouse I do not for a moment believe that there was or could be any question of his guilt, but that is beside the point. Any prejudice to an accused person must be avoided at all costs. It is very true to say that not only should justice be done but that it should manifestly appear to be done" (pp. 169-170).

(7)

"The Newspaper and Crime", address by Stanley Walker, City Editor, New York Herald-Tribune, printed in Attorney General's Conference on Crime, Dec. 10-13, 1934, Washington, D. C.

"In general, however, I am all in favor of the merciless, complete printing of all the news of crime. In no other way can the public be shaken out of its natural lethargy" (p. 6).

"I believe it is better for the public to be fully informed, whether the facts are pleasant or shocking, than to remain ignorant" (p. 7).

(8)

"Why Print Crime News", address by Paul Bellamy, Editor, Cleveland Plain Dealer, printed in Attorney General's Conference on Crime, December 10-13, 1934, Washington, D. C.

"Again, the newspaper which is honestly endeavoring to clean up crime in its community will meet with the criticism that it is whipping up a public hysteria which makes it impossible for defense lawyers to obtain jurors of an open mind, inasmuch as jurors, after all, are a part of the community. Anyone with considerable experience in the newspaper business can probably remember cases when something like this happened, and it should not happen. On the other hand, I am forced to observe in this connection, as I did in the matter of the moronic youths who imitate criminals, that if it is so, I do not see much that can be done about it. There should certainly be no deliberate attempt to build up unfair psychology toward any given criminal, but I would defend as long as I had any breath, the obligation of a newspaper to build up the strongest possible psychology that it can against crime. Lawyers, alas, do not always conduct the defense of criminals in such a way as to convince the unprejudiced observer that their principal object is the attainment of justice. If a layman dare make an observation with regard to the case I should like to suggest that the method of jury selection permitted, if not made obligatory, under the laws of most of our states, is a travesty and a joke. Repeatedly I have seen lawyers proceed toward the selection of a jury with no other purpose in mind, so far as an outsider can determine, except to get just as dumb a jury as possible and a jury which can have the wool pulled over its eyes as easily as possible by rhetoric and passionate declamation. It has always seemed to me a particularly foolish thing to allow lawyers to eliminate from juries all persons who will admit that they have read any newspaper record concerning an important or sensational crime. At risk of being accused of making a sales talk for newspapers, I should like simply to observe that most people in this day and generation do read newspapers, and those who do not read newspapers

are for the most part more nearly analogous to the vegetable than to the animal kingdom. They are people who do not know what is going on, who have no opinion, no imagination, very little education, and for the most part are utterly incapable of analyzing any proposition requiring thought" (pp. 14-15).

(9)

Wendell Berge, "The Prosecutor and Crime Publicity", 29 A.B.A.J. 63 (1943)

"The prosecutor is not merely an advocate—he appears in Court 'clothed in official raiment'" (p. 64).

(10)

Statement of Judge of the Criminal Court of Baltimore City, quoted in *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912

". . . (B)ut Judges are supposed to be made of sterner stuff than to be influenced by irresponsible statements regarding pending cases. They are trained to put aside inadmissible evidence and while we, of course, recognize our limitations, I think that most Judges, at least, are fairly able to disregard improper influences which may have reached their attention.

"Now, what about the jury? In the first place, what is this jury that we are talking about? They are twelve men, or in most jurisdictions now, as in Maryland, men and women who are picked from all walks of life and who have the responsibility of hearing cases and determining, in this State at least, not only the facts but the law in the case. It may be unfortunate, perhaps, but certainly the fact is that the jury's verdict is final in most cases. There is the limited protection of the accused to apply for a new trial, but the Court of Appeals can not determine—review and determine—the propriety of the verdict reached by the jury either on the law or on the facts. Now this jury system is intended, and I think it works out that way, to bring to the trial of a case as one element, the public opinion in the community. It is true that the jury is sworn to decide the case upon the evidence which it hears from the witness

stand, but I think that no experienced lawyer would contend that a jury is not expected to bring to the consideration of its verdict the temperament of the community in which the members of the jury live. The jury is called upon to decide the facts as it hears them from the witness stand in the light of its past experience and, if you please, its past knowledge. True, attempts are made to get jurors who have not been touched with any previous influence in the case, but the safeguards that are provided for the realization of that ideal are all too limited" (pp. 913-914).

"Now, the Court can not help but feel that the broadcast referred to in these cases must have had an indelible effect upon the public mind and that that effect was one that was bound to follow the members of the panel into the jury room . . . " (p. 915).

"The suggestion was made here also, that the mischief could have been avoided by exercising the right of the Defense to examine, on their voir dire, all prospective jurors and then inquiring as to whether or not they had heard these broadcasts. Well, now, it hardly seems necessary for the Court to say to men who are experienced in the trial of jury cases, that every time Defense Counsel asked a prospective juror whether they had heard a radio broadcast to the effect that his client has confessed to this crime or that he has been guilty of similar crimes, he would by that act be driving just one more nail into James' coffin. We think, therefore, that remedy was useless" (p. 916).

(11)

Canon of Professional Ethics No. 20, American Bar Association

NEWSPAPER DISCUSSION OF PENDING LITIGATION

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of Justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file

in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

(12)

People v. *Ford*, 25 Cal. App. 388

". . . Ordinarily where there is an existing highly inflamed condition of the public mind prejudicial to a person charged with crime, it finds some manifestation through the public press, or by assemblages of the people in the neighborhood of the scene of the crime, and, if general, in other parts of the county. . . . "

(13)

Bernard Botein, *The Prosecutor* (Pocket Books, Inc., Publishers, 1957)

"This is my recurring premise, conjugated in case histories—that a ruthless, resourceful prosecutor, indifferent to the rights of defendants, can with little risk win headlines or fame. Such a small group of lawless law-enforcement officers, dangerous out of all proportion to their number, can evolve only because most of us are entirely unaware of the anatomy of a prosecuting agency. We form strange, romantic notions of a district attorney's job, shaped by fictional and Sunday supplement stories.

"When reading unabashed fiction we exult in the skill with which Perry Mason or Ephraim Tutt put the overweening and ruthless prosecutor to rout. Through many pages, before we reach the courtroom finale, the author has taken pains to win our sympathy for the morally, if not legally, innocent defendant; and to excite our detestation for the loathsome district attorney, who would offer the defendant as a human sacrifice on the altar of his ambition and vanity. We find ourselves ranged on the side of virtue, which is a good enough fictional equivalent for law and order.

"But in real life this same concern for law and order sometimes causes us unwittingly to admire and vote for the very type of prosecutor we loathe in fiction—provided he puts on a resounding show in lashing the hapless sus-

pect. Everybody is for curbing crime, and as vigorously as possible. Unfortunately, the public has no means of distinguishing official vigor from official excesses. It is safer politically for a prosecutor to ride roughshod over the rights of an accused, provided he does so with energy and fanfare, than to proceed cautiously with scrupulous regard for those rights. The latter course might be misconstrued as coddling criminals or official laxity. As the late Justice Jackson wrote, 'District attorneys who have been rebuked by the courts are frequently promoted by the public.'

"In real life there is no helpful author to convince us of the innocence of the defendant. The mere accusation by vested authority so debases the accused in the public mind as to muffle his protestations of innocence; and also taints anyone who questions the prosecutor's methods. Prosecution becomes largely an *ex parte* business. The major vice of some few prosecutors—abuse of human rights and privileges—becomes a major virtue in the eyes of the public.

"I do not recall any prosecutor ever coming a cropper because of the harshness of the methods he employed—provided he did not invite scrutiny by some collateral political blunder. This holds true as well in related fields of public service. If a United States senator advocates high taxes he will be criticized by colleagues, newspapers and persons opposed to such a program. However, let him investigate fraud in the processing of those tax returns, and he can do no wrong.

"The remedy, as I see it, is not to strip prosecutors of any of their powers. As balanced by a proper regard for the protection afforded the individual by the Bill of Rights and related legislation, a prosecutor needs these powers to do an effective job. But I believe abuse of these necessary powers can be discouraged through a critical public made aware of prosecuting methods. And I also believe that a tendency by the decent members of a prosecuting staff to shrug off the improper conduct of a few associates as a matter of their personal privilege will diminish as they are jolted into realization of the consequences" (pp. 243-245).

(14)

Statement of John Lord O'Brian Concerning Prosecutions Under the Espionage Act of 1917, Quoted in Zechariah Chafee, Jr., *Free Speech in the United States* (Harvard University Press, Publishers, 1948)

"It has been quite unnecessary to urge upon the United States Attorneys the importance of prosecuting vigorously, and there has been little difficulty in securing convictions from juries. On the contrary, it has been necessary at all times to exercise caution in order to secure to defendants accused of disloyalty the safeguard of fair and impartial trials. In addition to the causes already recited there were the patriotic agitations continually being carried on by the Liberty Loan speakers, four-minute men and others, all of which worked the whole country up to a pitch of intense patriotism, resulting in instinctive aversion toward anyone even under suspicion for disloyalty" (p. 67).

Also Chafee:

"For the human machinery broke down at a second point—the jury. It is sometimes suggested that a jury trial gives a sufficient protection for freedom of speech, and that public sentiment will inevitably reflect itself in verdicts of acquittal if the prosecution seems unjust. It is undoubtedly true that in England freedom of discussion is, as Dicey says, 'little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written.' In my first chapter, however, I have endeavored to show that this protection is entirely inadequate and that the constitutional provision must mean much more. It is only in times of popular panic and indignation that freedom of speech becomes important as an institution, and it is precisely in those times that the protection of the jury proves illusory. As the Assistant to the Attorney General admits, 'There has been little difficulty in securing convictions from juries'" (p. 70).

(15)

Joseph Ratner (Ed.), *The Philosophy of Spinoza* (The Modern Library, Publishers, 1927)

"If we imagine men to love or hate a thing, we shall therefore love or hate it; that is to say, we shall therefore rejoice or be sad at the presence of the thing, and therefore we shall endeavor to do everything which we imagine men will look upon with joy, and, on the contrary, we shall be averse to doing anything to which we imagine men are averse.

"He who imagines that he affects others with joy or sorrow will necessarily be affected with joy or sorrow. But since man is conscious of himself by means of the emotions by which he is determined to act; therefore if a person has done anything which he imagines will affect others with joy, he also will be affected with joy, accompanied with an idea of himself as its cause; that is to say, he will look upon himself with joy. If, on the other hand, he has done anything which he imagines will affect others with sorrow, he will look upon himself with sorrow" (pp. 241-242).

(16)

R. M. MacIver, *The Web of Government* (The Macmillan Company, Publishers, 1948)

" . . . All institutions, whether dignified by ceremony or not, tend to implant in men a sense of the authority that maintains them. Since the state is the guardian and maintainer, at least in a formal sense, of all social institutions the might of its authority is omnipresent. Whatever men do, whatever they strive for, predicates under normal conditions the existing frame of institutions. Our dependence on institutions becomes identified with our dependence on authority, and the value we attach to institutions is reflected in our respect for authority" (p. 46).

"Power is multi-form. By social power we mean the capacity to control the behavior of others, either directly by fiat or indirectly by the manipulation of available

means. Property and status are thus sources of power. But there are various other sources. The office a man holds gives him a certain amount of power, apart from the status attaching to it or the particular prestige of the office-holder. This is the power of bureaucracy. Akin to it is the power of any specialist; who can take advantage of his function or technique to control to his liking the actions of other men. There is also the ampler power accruing to the headship of any organization, varying with the kind of organization and its extent . . . " (p. 87).

"The agencies of publicity take higher rank in the power structure. Here we reach a source of power peculiarly modern, the control, through ownership or otherwise, of those media of communication that transmit news or promulgate opinion. We include here the motion picture industry, since it purveys news and since the films it produces inevitably are impregnated with some kind of doctrine or at least with some philosophy of life. We include the radio, though, owing to the technical conditions of broadcasting, governmental regulation and other considerations restrict tendencies to make this medium the organ of the particular doctrines or policies of the companies which own it—where the radio system is not state-administered. Where democratic conditions prevail state administration is itself subject to similar restrictions. It is otherwise with the business of publishing, especially the publishing of newspapers and periodicals. Since news-gathering is a vast and costly enterprise and since the economics of newspaper publishing limits the number of major newspapers in any area to a very small group, the power of the press is concentrated in the hands of a few men. This power of the press is increased through the development of newspaper chains under one ownership, through the syndication of articles and features, and through the hook-up of newspapers with radio stations. The newspaper has another kind of power, in that it determines the degree of publicity to be assigned to the doings of persons and organizations, apart from the publicity of paid advertising. The importance of this power depends on the fact that publicity in modern society is

not only a factor of prestige but also, for certain occupational categories and for many kinds of organization, a primary condition of success in their respective pursuits" (pp. 89-90).

(17)

Thomas Hobbes, *Leviathan* (Basil Blackwell, Oxford, Publisher)

"And as the power, so also the honour of the sovereign, ought to be greater, than that of any, or all the subjects. For in the sovereignty is the fountain of honour. The dignities of lord, earl, duke, and prince are his creatures. As in the presence of the master, the servants are equal, and without any honour at all; so are the subjects, in the presence of the sovereign. And though they shine some more, some less, when they are out of his sight; yet in his presence, they shine no more than the stars in the presence of the sun" (p. 120).

(18)

Robert E. Cushman, *Civil Liberties in the United States,* Cornell University Press, Publishers, 1956

"Community hysteria whipped up by 'yellow' press and radio stories of crimes may well make it impossible in many instances to empanel a jury which can keep out of its mind the prejudice and antagonisms thus aroused" (p. 152).

(19)

Gerth and Mills (Tr.), *From Max Weber: Essays in Sociology* (Oxford University Press, Publishers, 1946)

" . . . Every sort of 'popular justice'—which usually does not ask for reasons and norms—as well as every sort of intensive influence on the administration by so-called public opinion, crosses the rational course of justice and ad-

ministration just as strongly, and under certain conditions far more so, as the 'star chamber' proceedings of an 'absolute' ruler has been able to do. In this connection, that is, under the conditions of mass democracy, public opinion is communal conduct born of irrational 'sentiments.' Normally it is staged or directed by party leaders and the press" (p. 221).

(20)

Harold Laski, *The American Democracy* (The Viking Press, Publishers, 1948)

"In no country in the world today has the lawyer a standing remotely comparable with his place in American politics" (p. 110).

(21)

Gunnar Myrdal, *An American Dilemma* (Harper & Brothers, Publishers, 1944)

"The jury, for the most part, is more guilty of obvious partiality than the judge and the public prosecutor" (p. 552, discussing justice for Negroes in southern courts).